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IN THE

Supreme Court of the United States

October Term, 1957

No. 1017

DU BOYES, INC., ARKEL, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, d.b.a. B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ, d.b.a. B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

v.

MARCEL BOUCHER, d.b.a. BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER, d.b.a. MARCEL BOUCHER, ET CIE.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Du Boyes, Inc., Arke, Inc., Capri Jewelry, Inc., Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman, d.b.a. B. Steinberg-Kaslo Company (sued as Jules Steinberg and I. Slovitz, d.b.a. B. Steinberg-Kaslo Company), Volupte, Inc., and Walter Heimler, Inc., pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 7, 1958 in the case there entitled "Marcel Boucher, d.b.a. Boucher, and Marcel Boucher and Jeanne Boucher, d.b.a. Marcel Boucher et Cie., Plaintiffs-Appellees, v. Du Boyes, Inc., Arke, Inc., Capri Jewelry, Inc., Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman, d.b.a. B. Steinberg-Kaslo Company (sued as Jules Steinberg and I. Slovitz, d.b.a. B. Steinberg-Kaslo Company), Volupte, Inc. and Walter Heimler, Inc., Defendants-Appellants, Docket No. 24,589.

Opinions Below

The findings of fact and conclusions of law and interlocutory and final judgments of the District Court are printed in the certified record and the nine copies of the printed record below filed herewith (R. 152a-171a)*. (The District Court did not deliver a separate opinion.) The opinion and judgment of the Court of Appeals are printed in the Appendix hereto (A. 1a-3a)* and reported in 117 U. S. P. Q. 156, but not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1958 (A. 4a). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1) and under Rule 19, paragraph 1 (b) of the Revised Rules of this Court.

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* Record citations will be in the following form:

(R. 2a)—Page 2a of the certified record and in the printed record below which have corresponding pagination;

(A. 2a)—Page 2a of the Appendix to this petition bound with it.

The Questions Presented

1. Is costume jewelry (earrings, pins, clips, necklaces, bracelets, etc.) "writings" within the meaning of Art. 1, Sec. 8, Cl. 8 of the Constitution of the United States and, if so, is costume jewelry proper subject matter of copyright under the existing Copyright Law of the United States (17 U. S. C.)?

2. Did the Register of Copyrights, with the approval of the Librarian of Congress and without the consent of Congress, have the authority under Section 207 of the Copyright Law to include "works of artistic craftsmanship", and thereby costume jewelry, as copyrightable subject matter, so long as Congress did not include such subject matter in the Copyright Law under Art. 1, Sec. 1, Cl. 1 of the Constitution?

3. When copyright registration is obtained on a single article of costume jewelry, is the statutory requirement of copyright notice under Section 10 of the Copyright Law (17 U. S. C.) which states that "such notice shall be affixed to each copy of the work published or offered for sale in the United States", complied with when the copyright notice is affixed to only one of a set of two of said articles of costume jewelry removably clipped to a card, when such articles, although sold in sets of two, also may be used separately or independently by the consumer?

Constitutional Provision

Article 1, Section 8, United States Constitution:

> The Congress shall have power * * * (Clause 8) to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Statutes Involved

The Copyright Act of 1870, July 8, 1870, Ch. 230 (16 Stat. L 212), "An Act to revise, consolidate and amend the Statutes relating to Patents and Copyrights."

> Sec. 86. And be it further enacted, that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts. * * * shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. * * *

Amendatory Act of August 24, 1912; 37 U. S. Stat. L. Pt. 1. Chap. 356, p. 488

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections five, * * * of the Act entitled "An Act to amend and consolidate the Acts respecting copyrights," approved March fourth, nineteen hundred and nine, be amended to read as follows:
>
> Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> (a) Books, * * *
>
> * * *

(l) Motion-pictures, photoplays,*

(m) Motion-pictures other than photoplays:*

* * *

Title 17, United States Code:

§1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work; July 30, 1947, C. 391, §1, 61 Stat. 652.

§4. *All writings of author included*

The works for which copyright may be secured under this title shall include all the writngs of an author. July 30, 1947, c. 391, §1, 61 Stat. 652.

§5. *Classification of works for registration.*

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

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* Classes added to Sec. 5 of the Act of 1909.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion-pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

§10. *Publication of work with notice.*

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

§207. *Rules for registration of claims*

Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

Rules and Regulations of the Copyright Office

37 C. F. R., Ch. II, Part 202 (as of March 1948) Sec. 201.4 (b)

(7) Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.

37 C. F. R., Ch. II, Part 202 (effective March 1, 1949) §202.8. Works of art Glass G)—(a) In general.

This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings, and sculpture. * * *

Universal Copyright Convention

The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences, and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows:

Article I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings,

musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

* * * * *

ARTICLE X

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

* * * * *

Statement of the Case

Petitioner, B. Steinberg-Kaslo Company manufactures and sells costume jewelry. The other petitioners are jobbers, purchase the costume jewelry from petitioner, B. Steinberg-Kaslo Company and sell the same to dealers. Respondents manufacture and sell costume jewelry. The costume jewelry comprise earrings, pins, clips, necklaces, bracelets, etc.

Respondents obtained copyrights on pieces of costume jewelry and brought the action against petitioners in the United States District Court for the Southern District of New York for copyright infringement and unfair competition and after a trial of the issues, the District Court found for the respondents on the copyright infringement claim but dismissed respondent's claim for unfair com-

petition. The District Court issued and filed its findings of fact and conclusions of law (R. 152a). Interlocutory judgment for infringement was entered (R. 164a) and final judgment for $32,757.22 was entered (R. 168a).

Petitioners appealed from the interlocutory and final judgments, to the Second Circuit Court of Appeals (R. 167a, 172a). On April 7, 1958, the Court of Appeals filed its opinion (A1a-3a) affirming the District Court's judgment and on April 24, 1958 its judgment was filed in the District Court.

With respect to questions 1 and 2, the decisions and judgments of both lower courts resulted from a misinterpretation of this Court's decision in *Mazer* v. *Stein*, 347 U. S. 201, are in conflict with existing statutes and decisions of this Court and disregarded the true intent and purpose of Art. 1, Sec. 8, Cl. 8 of the United States Constitution with respect to questions 1 and 2 and the mandatory requirement of Sec. 10 of the Copyright Law (17 U. S. C.) with respect to question 3.

All of the copyrights in issue, namely eleven, are involved with respect to questions 1 and 2 presented herein. Photoprints of respondents' articles of costume jewelry relating to these copyrights appear on pages R. 82a1 to R. 82a11.

As hereinafter fully set forth, under the constitutional provision, it is Congress, alone, which is given the power to secure for limited times to authors the exclusive right to their respective writings, and, therefore, it is Congress, within the limits of the Constitution, that decides what is to be embraced by the word "writings", which decision cannot be delegated to or usurped by the Librarian of Congress or the Register of Copyrights. There is no authority under the constitution or by act of Congress to include costume jewelry as copyrightable subject matter.

Three of the copyrights in issue are involved with respect to question 3. The articles of costume jewelry manufactured by respondents under these three copyrights comprised 36% of respondents' total quantity in issue (R. ii opposite p. R 1a) and relate to earrings and pins corresponding to the photoprints R. 82a5, R. 82a8 (which has a matching pair of earrings, only one of which had the statutory copyright notice affixed to it) and R. 82a11. These earrings are of the clip type. Thus, these clip earrings although usually sold in pairs removably clipped to a card, because of their easy manner of attachment, that is, by a simple clipping or clamping action, are very frequently used individually or independently by women as ornamental clips on wearing apparel, pocketbooks and purses or as an ornamental fastening means by passing the clip portion through two registering buttonholes of a garment and clamping it against the fabric. Therefore, because of their adaptability and capability of being used as independent items, each must have affixed to it the statutory copyright notice.

The errors of law may be stated in the following words in the decision of the Court of Appeals (A1a-3a) in affirming the lower court:

> The defendants' contentions upon this appeal are addressed to the technical requirements of the provisions of the Act; together with a claim that the items in question, designed and manufactured by the plaintiffs are not copyrightable subject matter and entitled to protection under the Copyright Law. The later claim is untenable. The decision in Mazer v. Stein, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention (37 C. F. R., 1949, §202.8).
>
> * * * * *

> Plaintiffs' earrings were sold in sets of two. The copyright notice was stamped upon only one earring of each set and it is therefore contended that such a notice was insufficient under the statute. The argument seems to be based on evidence to the effect that a single earring may be used as a dress ornament or clip and that some of the defendants' earrings were sold singly for that purpose. The contention is rejected. Because earrings might be used singly does not mean that they are separate works of art. The plaintiffs invariably sold them in pairs. Each pair was considered as a unit. (*Patterson* v. *Century Productions*, 2 Cir., 93 F. 2d 489, cert. den. 303 U. S. 665; *Lydiard-Peterson Co.* v. *Woodman*, 204 Fed. 921 * * *

Petitioners respectfully submit that the Court of Appeals was in error in applying *Mazer* v. *Stein*, 347 U. S. 201, to the case at bar; and in ruling that, where the copyright registration was obtained on but a single earring, a copyright notice on only one of a pair of earrings, complied with Section 10 of the Copyright Law (R. 181a, R. 187a, R. 193a).

Reasons for Granting the Writ

1. This is an important matter of national consequence to the costume jewelry industry, a multi-million dollar industry which is widespread in the United States and finds it wares worn by substantially every girl and woman.

2. The Court of Appeals has misconstrued the Copyright Law and the decisions of this Court with respect to copyrights. This Court has not heretofore held that costume jewelry is subject to copyright protection. It did not so hold in *Mazer* v. *Stein*, 347 U. S. 201.

3. Substantially all of the costume jewelry sales are centered in new York City. The courts outside of the Second Circuit are not likely to have cases arising involving this question.

4. This Court has heretofore granted certiorari to review important questions of interpretation of the patent and trademark laws, even where there has been no diversity of opinions between Circuits, when substantially all of the industry involved is in one circuit. *Muncie Gear Works, Inc., et. al.*, v. *Outboard Marine & Manufacturing Co., et al.*, 315 U. S. 759, 766; *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 128; *Mackay Radio & Telegraph Co.* v. *Radio Corporation of America*, 306 U. S. 86, 89; *Schrieber-Schroth Co.* v. *Cleveland Trust Co., et al.*, 305 U. S. 47, 50; *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464 *

5. The question as to whether works of artistic craftsmanship, and in particular costume jewelry, are "writings" within the meaning of Art. 1, Sec. 8, Cl. 8 of the Constitution has not been heretofore decided by this Court and certainly not by *Mazer* v. *Stein*. In the words of Mr.

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* In *Muncie Gear Works Inc. et al.* v. *Outboard, Marine & Manufacturing Co. et al.*, the Court considered as a reason for the granting of certiorari to review a decision of a Circuit Court of Appeals sustaining claims of a patent as to which there was no conflict of decision, the fact that the patent dominated a substantial portion of an industry so concentrated in one circuit that a conflict of decision was unlikely, citing *Schreiber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47. In the latter case it was held that where it is improbable, notwithstanding the doubtful validity of a patent, that conflict of decision respecting its validity will arise in different circuits, because of the concentration in one circuit of the industry in which the patented devices are used, there is reason for granting certiorari to review a decision in that circuit sustaining it, citing *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464; *Altoona Publix Theatres* v. *American Tri-Ergon Corp.*, 294 U. S. 477.

Justice Dougles it is time that the Supreme Court "came to the problem full face".

6. In *Mazer* v. *Stein*, Mr. Justice Dougles, in a separate opinion concurred in by Mr. Justice Black, said:

> "An important constitutional question underlies this case—* * *. It is whether these statuettes of dancing figures may be copyrighted. * * *
>
> "* * * Is a sculptor an 'author' and is his statue a writing within the meaning of the Constitution. We have never decided the question.
>
> * * * * *
>
> "*The interests involved in the category of 'works of art', as used in the copyright law, are considerable.* The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, bookends, clocks, lamps, doorknockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all 'writings' in the constitutional sense. But to me, at least, they are not obviously so. *It is time that we came to the problem full face.*" * * *. (Italics supplied.)

7. Under Article X of the Universal Copyright Convention of which the United States is a party, the United States must be in a position under its *domestic law* to give effect to the Convention, including Article I thereof, which requires the contracting State to undertake to provide for the adequate and effective protection of the rights of copyright proprietors in literary, scientific and artistic works. It cannot delegate that power to, nor can it be assumed by the Librarian of Congress.

8. The Court of Appeals was in error in deciding that, because, respondents sold their earrings in pairs, each pair was considered as a unit—a single work of art and that it is sufficient if only one earring of each pair is marked with the copyright notice. This, despite the fact that the earrings may be used separately or independently as dress ornaments (R. 206a).

ARGUMENT

1. With Respect to Questions 1 and 2.

The protection of artistic designs applied to industrial products by the Copyright Law should be clearly legislated for by an appropriate amendment to the Copyright Law and *not* by a rule or regulation of the Copyright Office. (II Ladas, The International Protection of Literary and Artistic Property (1938) 718.) Copyright protection for artistic craftsmanship applied to industrial products is too important a matter to be determined by rules or regulations of the Copyright Office controlled by a single person—the Register of Copyrights—even with the approval of the Librarian.

Section 35 of the British Act of 1911 defines artistic work to include a work of "artistic craftsmanship". Therefore, Congress should define works of art to include artistic craftsmanship and should legislate that works of artistic craftsmanship are copyrightable.

To allow the Register of Copyrights to exercise power to include or exclude artistic craftsmanship in a category or class created by Congress is to give him the power to legislate under the guise of making a regulation.

Even the statement at the end of Section 5 of the Copyright Law that the specifications or classes enumerated

therein (a) to (m) shall not be held to limit the subject matter of copyright, as defined in Section 4 of Title 17, does not give the Register of Copyrights this power to include artistic craftsmanship in 37 C. F. R. §202.8, a material change from 37 C. F. R. §201.4 (b) (7) which was in effect prior to March 1, 1949.

When Congress had enacted the Copyright Law to include "works of art" an expansion of the law to include "works of artistic craftsmanship" (37 C. F. R., Ch. II, Part II, Sec. 202.8), is an act of legislation by the Register of Copyrights, without authority by Congress. Only Congress is given the authority by the Constitution to enact substantive provisions as to copyright legislation. It did not delegate that authority to the Register of Copyrights; the latter assumed an authority which he did not have.

In the earlier rule (37 C. F. R., Ch. II, Part 202, Sec. 201.4 (b) and (7), the Register of Copyrights exercised rule-making power to indicate practice, but there was no attempt to provide a substantive definition of "works of art". That rule continued in effect for more than 25 years. Only then, without act of Congress, did the Register of Copyrights arbitrarily include "works of artistic craftsmanship" within the law of copyright.

From the first enactment in 1790 to the most recent codification in 1947, it was Congress which specified and enumerated the subjects or works which may be protected by copyright.

In 1909, Congress enacted the Copyright Act* defining the classes of copyright registration (a) to (k). In 1912,

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* 35 Stat. L. 1075. The Act of March 4, 1909, revised, collated, and reorganized the federal copyright laws and this Act became, and still is the basic copyright law. It repealed and superseded prior laws on the subject of copyrights, and established the office of Register of Copyrights under the supervision of the Librarian of Congress.

Congress amended the Act to include two additional classes (l) and (m). Any further amendment to include "works of artistic craftsmanship" should be made by Congress, and not by the Register of Copyrights.

Art. 1, Sec. 8, Cl. 8, of the Constitution of the United States, provides that Congress shall have power to promote the progress of the useful arts by securing for limited times to authors the exclusive right to their respective writings. Thus, copyright is purely a statutory right or grant and enjoys only the right which the statute confers. *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *Bobbs-Merill Co.* v. *Strauss*, 210 U. S. 339; *White-Smith Music Publishing Co.* v. *Appollo Co.*, 209 U. S. 1; *Banks* v. *Manchester*, 128 U. S. 244; *Wheaton* v. *Peters*, 8 Pet. (U. S.) 591. Copyrights may be obtained and enjoyed only in respect to the works or subjects specified in the statute (*New York Times Co.* v. *Star Co.*, 195 Fed. 110).

No authority exists for obtaining a copyright beyond the extent to which Congress has authorized it (*Banks* v. *Manchester*, *supra*), and since copyright in published works is purely a statutory creation, a copyright may be obtained only for work falling within the statutory enumeration or description (*Wood* v. *Abbott*, 30 F. Cas. No. 17,948; 5 Blatchf. 325). There is no statute which provides copyright protection for costume jewelry or works of artistic craftsmanship.

Thus, the Court of Appeals in affirming that costume jewelry is copyrightable, is in conflict with the foregoing decisions.

Re: *Mazer* v. *Stein*, 347 U. S. 201.

This case involved the validity of copyrights obtained for statuettes of male and female dancing figures made of

semi-vitreous china. The controversy centered around the fact that although copyrighted as "works of art", the statuettes were intended for use and used as bases for complete table lamps. It involved the registration of statuettes and their later embodiment in industrial articles.

There was only a single question presented to this Court for consideration:

> Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?

The Court answered this question in the affirmative, holding that the successive Acts, the legislative history of the 1909 Copyright Act, and the practice of the Copyright Office unite to show that "works of art" and "reproductions of works of art" are terms that were intended by Congress to include authority to copyright *statuettes* intended primarily for use in form of lamp bases to be made and sold in quantity.

The 1909 Copyright Act superseded prior laws on the subject of copyright including the Copyright Act of 1870 which specifically included "statue" and "statuary" as works of art which could be copyrighted. (See p. 4, this petition.) The Court in its opinion specifically referred to and quoted from the 1870 Act, and referring to the 1909 Act which provided that the works for which copyright may be secured under this Act shall include all the writings of an author, said that the House Report (H. R. Rep. No. 2222, 60th Cong., 2d Sess. 10), "while inconclusive, indicates that it was 'declaratory of existing law' only."

This Court in reviewing the practice of the Copyright Office and the pertinent Copyright Regulations published by it under the 1870, 1874 and 1909 Acts, said:

> "So we have a contemporaneous and long-continued construction of the statutes by the agency charged to administer them that would allow the registration of such a *statuette* as is in question here." (Italics supplied.)

The Court is respectfully referred to Mr. Justice Douglas' statements in petitioners' sixth reason for the granting of the writ. The interests involved in the category of "works of art" as used in the copyright law, in general, and with relation to the inclusion therein of costume jewelry, in particular, are considerable and it is respectfully submitted that this problem should be met "full-face" by this honorable court.

The problem raised by Mr. Justice Douglas in *Mazer* v. *Stein* should be met "full face" more so now in view of the fact that the United States has become a party to the Universal Copyright Convention, after *Mazer* v. *Stein* was decided by this Court.

The Unesco Universal Copyright Convention was adopted by the Intergovernmental Copyright Conference at Geneva, Switzerland, on September 6, 1952. It entered into force for the United States on September 16, 1955. The text of the Convention is set out in full in the footnote (under §9) of the 1957 Cumulative Annual Pocket Part of United States Code Annotated (Title 17, Copyrights) pages 12 to 17, inclusive and in Kupferman and Foner, Universal Copyright Convention Analyzed (1955) pages 173 to 186, inclusive.

The preamble and Articles I and X are printed herein (pp. 8-9). The provisions of Article I of the Convention are

general. There is no definitive enumeration of works or rights to be protected. As the Convention is not self-executing, it expressly requires each State to "adopt, in accordance with its Constitution, such measures as are necessary", and that "each state must be in a position under its domestic law to give effect to the Convention".

> Unlike Berne and the divers Pan-American conventions, which define the works and rights protected, this Convention, being an international statute, left it to each state to specify the works which are to be embraced within the general categories of literary, scientific and artistic works, as defined in Article I. Under the Convention, therefore, each state may decide whether oral or architectural works, engravings, natural art, technical drawings, works of applied art or other works are within the classifications stated in Article I. Some states grant protection under their domestic law to one class of works, while others are prohibited from doing so. Some states protect works of applied art, while others do not give protection to architectural or other useful works. Some states may determine whether all public performances may be protected, while others may limit protection to public performances for profit, and still others may impose compulsory licenses or exempt certain uses of the work from protection. While copyrightability, thus, may vary from country to country, a single *standard* of protection is established.*

Therefore, it is the province of Congress and it alone, to specify or define works of applied art or artistic craftsmanship with relation to copyright protection—to give effect to the Universal Copyright Convention.

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* Universal Copyright Convention Analyzed, *supra*, pp. 18-19.

Even under the Berne Convention (United States was not a party) works of art applied to industry are protected only so far as the *domestic legislation* of each country allows. (I Ladas, The International Protection of Literary and Artistic Property [1938] 247.)

To specify or define works of applied art or artistic craftsmanship is too important an undertaking to be left in the hands of a single person, the Librarian of Congress, under his power to make rules and regulations. For a Librarian of Congress who may supplant him may very well and at will amend or repeal the very rule or regulation which he had made.

2. With Respect to Question 3.

The Court of Appeals was in error in deciding that, because respondents sold their earrings in pairs, each pair was considered as a unit—a single work of art and that it is sufficient if only one earring of each pair is marked with the copyright notice. This, despite the fact that the earrings may be used separately or independently as dress ornaments (R. 206a).

It is clear that the copyright registrations were obtained for a *single earring* (R. 181a, 193a) and for a *single pin* (R. 187a). The title of the work in each of the said certificates of copyright registrations does not make reference to copyright protection for a *pair* of earrings but to an earring. Furthermore, on the second page of the certificate (R. 182a, 188a, 194a) in paragraph 10 (a) "Wording of copyright notice appearing on work" respondent stated "© Boucher" and next to "Location of notice", respondent stated "Stamped on back of earring", which could only mean each earring. Therefore, each earring must be considered as a copy of the copyrighted work and in accordance with Section 10 of the Copyright Law the notice

must be affixed to "*each copy*" of the work "published or offered for sale". The same reasoning is applicable to where respondents copyrighted only the pin and under this copyright published and sold a matching pair of earrings removably mounted on a card, only one of the earrings being stamped with the copyright notice. The pair of earrings was not copyrighted. What this amounts to is that with respect to the earrings, only fifty percent of the copies were stamped or marked with the copyright notice.

In enacting the copyright statute Congress created a new right dependent on compliance with the statute. *Caliga* v. *Inter Ocean Newspaper Company, supra.*

The courts cannot lower the requirement as to copyright notice no more than the courts can enlarge the remedy. In *Globe Newspaper Company* v. *Walker, supra,* it was held that Congress alone has power so to do by amending the statute.

Section 10 (publication with copyright notice) of the Copyright Law is one of the sections that deals with the conditions of acquiring statutory copyright. This must be complied with as a condition precedent to the vesting of the statutory copyright. Section 1 of the Copyright Law, which defines the rights included in copyright, provides explicitly that these are conferred upon any person entitled thereto "upon complying with the provisions of this title". Under the Copyright Law publication initiates statutory copyright *provided* each copy of the work (each earring) when published bears the notice of copyright required by the Act. The object of the notice of copyright is to notify the public of the claim of copyright and this object is not fulfilled when fifty percent of the earrings do not bear this notice.

When two copies or reproductions of a work are published on one sheet or card, a notice *must* appear for each

of the copies or reproductions. *De Jonge & Co.* v. *Breuker & Kessler Co.* (1910) 182 Fed. 15 affirmed (1914) 235 U. S. 33, 36; 35 S. Ct. 6, 59 L. ed. 113.

Every reproduction of a copyrighted work must bear the statutory notice. *American Tobacco Co.* v. *Werckmeister* (1907) 207 U. S. 284, 28 S. Ct. 72, 52 L. ed. 208. *Deward & Rich*, v. *Bristol Savings & Loan Corporation*, C. C. A. Va. 1941, 120 F. 2d 537.

This Court said in *Miffin* v. *R. H. White Co.*, 190 U. S. 260,

> It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained since the right being purely statutory, the public may justly demand that the person claiming a monopoly shall pursue, in substance at least, the statutory method of securing it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAXWELL E. SPARROW,
Attorney for Petitioners.

J. PRESTON SWECKER,
of Counsel.

May 20, 1958

APPENDIX

Decision

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—October Term, 1957.

(Argued March 13, 1958 Decided April 7, 1958.)

Docket No. 24582

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Plaintiffs-Appellees,

—against—

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,*

HINCKS, *Circuit Judge,* and BRENNAN, *District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* awarding injunctive relief and damages in an action for copyright infringement. Affirmed.

—o—

FORSYTHE, MCGOVERN & FETZER, New York, N. Y. (Thomas A. McGovern, Burton L. Knapp, of counsel), *for plaintiffs-appellees.*

MAXWELL E. SPARROW, New York, N. Y., *for defendants-appellants.*

—o—

PER CURIAM:

It is not seriously disputed but that defendants manufactured and sold carbon copies of certain items of costume jewelry which had been registered in accordance with the Copyright Act as works of art.

The defendants' contentions upon this appeal are addressed to the technical requirements of the provisions of the Act, together with a claim that the items in question, designed and manufactured by the plaintiffs are not copyrightable subject matter and entitled to protection under the Copyright Law. The later claim is untenable. The decision in *Mazer* v. *Stein*, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention (37 C. F. R. 1949, §202.8).

The trial court found that the defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry; that said items were artistic in nature and were marked in compliance with the statute. The evidence adequately supports the findings and it is necessary only to comment upon one additional contention made by the defendants.

Plaintiffs' earrings were sold in sets of two. The copyright notice was stamped upon only one earring of each set and it is therefore contended that such a notice was

insufficient under the statute. The argument seems to be based on evidence to the effect that a single earring may be used as a dress ornament or clip and that some of the defendants' earrings were sold singly for that purpose. The contention is rejected. Because earrings might be used singly does not mean that they are separate works of art. The plaintiffs invariably sold them in pairs. Each pair was considered as a unit. (*Patterson* v. *Century Productions*, 2 Cir., 93 F. 2d 489, cert. den. 303 U. S. 655; *Lydiard-Peterson Co.* v. *Woodman*, 204 Fed. 921.) A somewhat simlar argument, addressed to plaintiffs' necklaces, is invalid since each carried a copyright notice on one of the integral parts.

Plaintiffs request an allowance of additional attorneys' fees for this appeal. In view of the deliberate nature of the infringement and the lack of substance to the defendants' contention on this appeal, the request has received consideration. An allowance for attorneys' fees has already been made below. Under the circumstances, an additional allowance of Five Hundred Dollars is made to the plaintiffs for the services of counsel on this appeal.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April one thousand nine hundred and fifty-eight.

Present: HON. CHARLES E. CLARK,
Chief Judge

HON. CARROLL C. HINKS,
Circuit Judge

HON. STEPHEN W. BRENNAN,
District Judge.

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER, ET CIE,
Plaintiffs-Appellees,

v.

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT & SAMUEL FRIEDMAN, et. al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

Further ordered that an additional allowance of $500.00 be and it hereby is granted to the appellees for the services of counsel on this appeal.

A. Daniel Fusaro
Clerk